Supreme Court, U.S.
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NO: _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

MICHAEL F. BLAKENEY,
Petitioner,

v.

BAKER HUGHES, INC.,
Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether a waiver of ADEA claims which does not meet the minimum statutory requirements of 29 U.S.C.A. §626(f)(1) is void or voidable.

PARTIES TO THE PROCEEDING

In accordance with Rule 29.1 of the Rules of this Court, Petitioner states that there are no persons other than himself or his attorney, or to his knowledge, Respondent, with an interest in the outcome of this case. Petitioner is not aware of the parents, subsidiaries or affiliates of Respondent.

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v.

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the court of appeals in this case:

OPINIONS BELOW

1. The court of appeals affirmed the district court's decision without an opinion (App.A-1a). The court of appeals affirmance is reported at 50 F.3d 1032. The opinion of the district court (App.B-3a) is not reported in Federal Supplement.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on March 6, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 201 of the Older Workers' Benefit Protection Act, 104 Stat. 978, 983-4 (Oct. 16, 1990) ("OWBPA") added a new subsection (f) to the Age Discrimination in Employment Act of 1967 ("ADEA"). This new subsection is codified at 29 U.S.C. §626(f) and reads as follows:

"(f) Waiver

(1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum--

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this chapter;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

BEST AVAILABLE

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the employer (at the commencement of the period specified in subparagraph (F)) informs the individual in writing in a manner calculated to be understood by the average individual eligible to participated, as to--

(I) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and

(ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

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(2) A waiver in settlement of a charge filed with the Equal Employment Opportunity Commission, or an action filed in court by the individual or the individual's representative, alleging age discrimination of a kind prohibited under section 623 or 633a of this title may not be considered knowing and voluntary unless at a minimum--

(A) subparagraphs (A) through (E) of paragraph (1) have been met; and

(B) the individual is given a reasonable period of time within which to consider the settlement agreement.

(3) In any dispute that may arise over whether any of the requirements, conditions, and circumstances set forth in subparagraph (A), (B), (C), (D), (E), (F), (G), or (H) of paragraph (1), or subparagraph (A) or (B) of paragraph (2), have been met, the party asserting the validity of a waiver shall have the burden of proving in a court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2).

(4) No waiver agreement may affect the Commission's rights and responsibilities to enforce this chapter. No waiver may be used to justify interfering with the protected right of an employee to file a charge or participate in an investigation or proceeding conducted by the Commission.

STATEMENT OF THE CASE

Factual Background

This is an employment discrimination suit brought pursuant to the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. ("ADEA"). Petitioner worked for Respondent from 1964 until April 6, 1992, when he was discharged as part of a general reduction in force. Petitioner has alleged that he was discriminated against in that he was discharged while younger, less qualified, less senior employees of Respondent were retained. Upon his termination, Petitioner signed a document entitled "Settlement Agreement and General Release (the "Release") in exchange for severance benefits totaling $11,000.00. The Release was found not to fully comply with the requirements of the waiver provisions of 29 U.S.C. § 626(f) ("OWBPA") because it did not advise Petitioner to seek the advice of an attorney prior to signing it.(App.B-5a-6a)

The District Court's Decision

Petitioner filed his Original Complaint on August 25, 1993. On May 19, 1994, Petitioner filed a Motion for Partial Summary Judgment, alleging that the Release was ineffective as a matter of law because it failed to comply with the statutory requirements of the OWBPA.

On May 27, 1994, Respondent filed its Motion for Summary Judgment and Answer to Plaintiff's Motion for Summary Judgment seeking disposition of all of Petitioner's claims stating, among other things, that Petitioner had ratified the release by retaining the severance benefits for too

long a time[1].

On July 11, 1993, the district court granted Petitioner's Motion for Partial Summary Judgment in part; denied it in part; and granted Respondent's Motion for Summary Judgment. The court found that the release failed to comply with the OWBPA. Specifically, the court found that the Release did not comply with the requirements of 29 U.S.C.A. §626(f)(1)(E) because it did not advise Petitioner to consult with an attorney prior to executing the Release. However, the court granted Respondent's Motion for Summary Judgment in finding that Petitioner had ratified the Release, barring all of Petitioner's claims.

A Final Judgment against Petitioner was entered on July 11, 1994. Petitioner timely appealed the district court's Final Judgment on July 27, 1994.

The Court of Appeals' Decision

The court of appeals affirmed the district court's ruling on March 6, 1995 without a written published opinion.

REASONS WRIT SHOULD BE GRANTED

Important Legal Issue

The ADEA was enacted to eliminate age discrimination in the workplace. In enacting the ADEA, the Congress found, among other things, that:

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[1]Petitioner tendered the severance benefits back to Respondent prior to filing Petitioner's Motion for Summary Judgment.(App. B 9a).

> "(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;
>
> . . . .
>
> (4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

29 U.S.C. §621(a). The ADEA is a remedial statute enacted with the intent of prohibiting "arbitrary discrimination in employment . . ." 29 U.S.C. §621(b).

The OWBPA was enacted in part to clearly delineate the minimum requirements for waiving rights under the ADEA in a knowing and voluntary manner. 29 U.S.C. §626(f)(1).

Whether ADEA waivers are enforceable is perhaps the most important issue which faces both the employer and the employee in the face of downsizing and layoffs. The employer needs to know whether the waiver which it has presented to the employee is enforceable or not, and the employee, if he is to waive rights under the ADEA must not be made to do so unknowingly or involuntarily. The OWBPA clearly intends to delineate a clear-cut threshold for determining when a waiver of ADEA rights is knowing and voluntary.

However, in *Wamsley v. Champlin Refining and Chemicals, Inc.*, 11 F.3d 534 (5th. Cir. 1993), cert denied, 115 S.Ct. 1403. 131 L.Ed.2d. 290 (1995) the Fifth Circuit Court of Appeals held that a waiver of ADEA rights which does not comply with the minimum requirements under the OWBPA is voidable and not void. Therefore, the court

reasoned, one who has received consideration for such a waiver must tender the consideration back to the employer in order to avoid ratifying the otherwise unenforceable waiver. The Fifth Circuit followed the decision in *Wamsley* with *Wittorf v. Shell Oil Company*, 37 F.3d 1151 (5th Cir. 1994).

As a practical matter, the decision in *Wamsley* renders the requirements of the OWBPA for executing a voluntary release meaningless because an employer can completely fail to comply with the OWBPA, pay severance benefits and then claim that acceptance and retention of the severance benefits constituted ratification of the otherwise involuntary release. An employer's superior bargaining position, which the OWBPA no doubt sought to equalize, has in fact been restored by the decisions of the Fifth Circuit which in essence render impotent the clear intent of the Congress in enacting the OWBPA.

As long as involuntary waivers can be ratified, uncertainty exists and cases will have to be decided on an ad hoc basis. The obvious question that arises is how soon after executing an involuntary release must one return severance benefits in order to avoid ratification? This will require a finding of fact by each court adjudicating ADEA cases involving an involuntary waiver or release of ADEA rights. This problem is particularly evident in the case at bar where Blakeney *did* return the severance benefits to Respondent only to have the Respondent refuse such tender and argue that the tender was not *timely*.

This is an important legal issue which potentially threatens many Americans' civil rights if not finally determined by this Court.

Circuit Split

There is currently a split in the circuits as to whether a release/waiver which fails to comply with the requirements of the OWBPA is void or voidable and, consequently, whether one must tender consideration for such waivers in order to maintain an ADEA lawsuit. As shown above, the Fifth Circuit in *Wamsley*, and later in *Wittorf* has held that waivers that do not comply with the OWBPA are voidable (and therefore can be ratified). The Fifth Circuit based its decision in *Wamsley* on *Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217 (5th Cir. 1991) and *O'Shea vs. Commercial Credit Corp.*, 930 F.2d 358 (4th Cir. 1991), cert.denied, 502 U.S. 859, 112 S.Ct. 177, 166 L.Ed.2d. 139 (1991) which were both pre-OWBPA. However, both cases were decided on the premise that state common law ratification doctrine operated to require a tender of the consideration in order to avoid ratification or an ADEA waiver.

On the contrary, the Seventh Circuit Court of Appeals has held that such defective releases are void (and therefore cannot be ratified). *Oberg v. Allied Van Lines, Inc.*, 11 F.3d 679 (7th Cir. 1993), cert. denied, 114 S.Ct. 2104, 128 L.Ed.2d 665 (1994). In *Oberg* the Seventh Circuit followed the Eleventh Circuit in a pre-OWBPA case, *Forbus v. Sears Roebuck & Co.*, 958 F.2d 1036 (11th Cir. 1992),cert. denied, 113 S.Ct. 412, 121 L.Ed.2d 336 (1992),[2] in its result, but its reasoning was based entirely upon the language of OWBPA.

In *Oberg*, the age discrimination plaintiffs had received severance benefits upon their termination from defendant/employer in exchange for executing releases. The

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[2]The court in ***Forbus***, relied on ***Hogue v. Southern R. Co.***, 390 U.S. 516, 88 S.Ct. 1150, 20 L.Ed. 2d 73 (1968) in its decision.

defendant stipulated that the releases did not comply with 29 U.S.C. §626(f)(1)(F)&(H), but argued that the plaintiffs had ratified the releases by failing to return the consideration to the defendant. The releases obligated the employees to return the severance benefits if they breached the agreement.[3] The plaintiffs stipulated that they had not tendered the severance benefits to the defendant. The court in *Oberg* stated:

> "Had Congress not spoken this court may have been inclined to follow *Grillet*[4] and *O'Shea*[5], and allow employees the freedom to ratify their severance agreements through general principles of contract law. However, Congress has occupied this area of the law through the enactment of the OWBPA.
>
> The OWBPA limits the form in which an employee and employer may contract to waive the ADEA provisions. The OWBPA states that '[a]n individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary.' . . . . The OWBPA language plainly restricts an employee's freedom to waive his rights or claims under the ADEA. When the plain text of a statute is clear then 'courts must presume that a

---

[3]The provision read: "Breach of this Agreement shall constitute a forfeiture of additional benefits referenced. If those benefits have already been conveyed as of the time of breach, the employee agrees that he/she will return these benefits." *Oberg*, 11 F.3d at 680.

[4]*Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217 (5th Cir. 1991).

[5]*O'Shea vs. Commercial Credit Corp.*, 930 F.2d 358 (4th Cir. 1991), cert.denied, 502 U.S. 859, 112 S.Ct. 177, 166 L.Ed.2d 139 (1991)

legislature says in a statute what it means and means in a statute what it says.'"

Oberg, 11 F.3d at 683. Consequently, the issue is not one of policy, but simply a matter of legislative intent. Congress has prohibited an employee from waiving ADEA claims absent compliance with the statutory requirements. Consequently, such a waiver contract cannot be ratified by retaining the consideration and there is no duty to tender the severance benefits in order to maintain an action for age discrimination. *Id.* The Fifth Circuit's decision in *Wamsley* and *Wittorf* is in conflict with the clear language of the statute.

This is an issue that merits immediate attention. Already four circuits--the Fourth, Fifth, Seventh and Eleventh--have addressed this issue from either a pre-OWBPA or post-OWBPA standpoint. Waiting for other circuits to consider this issue will not clarify the issue at hand. The issue is clear and the adverse impact of the precedent of the Fourth and Fifth Circuits on the civil rights of Americans over 40 years of age is certain.

Conflict with Decision of this Court

The decisions of the Fourth and Fifth Circuit are in conflict with the decision of this Court in *Hogue v. Southern R. Co.*, 390 U.S. 516, 88 S.Ct. 1150, 20 L.Ed. 2d 73 (1968). Although *Hogue* was a FELA case, the reasoning of that case is analogous to OWBPA cases. *Hogue* held that, based on 45 U.S.C. § 51 et seq. (1939), (which voids any contract which attempts to exempt a common carrier from liability under FELA), FELA employees were not required to return the consideration in order to challenge the validity of a FELA release. The Court held that such releases are void and "the question of whether a tender back of the

consideration was a prerequisite to the bringing of the suit is to be determined by federal rather than state law." *Hogue*, 390 U.S. at 517, 88 S.Ct. at 1151.

Oberg and *Forbus* recognized the applicability of *Hogue* to ADEA waivers and tender requirements. Consequently, this is a matter which should be decided by this Court in order to resolve the conflict with *Hogue*.

CONCLUSION

Petitioner requests that this Court grant his petition for certiorari because of the importance of this issue which potentially affects many Americans over the age of 40 and their employers. Furthermore, there is currently a split between five Courts of Appeal which should be resolved now. Waiting for other courts to rule will not further clarify the issue. Lastly, the rulings of the Fifth Circuit in *Wamsley* and the Fourth Circuit in *Oshea* are in conflict with this Court's decision in *Hogue*. For these reasons, Petitioner requests that his petition for certiorari be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20560

MICHAEL F. BLAKENEY,
Plaintiff-Counter
Defendant-Appellant,

versus

BAKER HUGHES, INC.,
Defendant-Counter
Plaintiff-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-93-2668)

Before POLITZ, Chief Judge, REAVLEY and BARKSDALE, Circuit Judges.

PER CURIAM:*

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

This matter is before the court on appeal by Michael F. Blakeney of an adverse summary judgment in his ADEA complaint against Baker Hughes, Inc. Having considered the briefs, oral arguments of counsel, and the summary judgment record, and on the basis of the findings and conclusions of the district court in it thorough and comprehensive Memorandum and Order filed July 11, 1994, the judgment appealed is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MICHAEL F. BLAKENEY,	§	
Plaintiff,	§	
	§	CIVIL ACTION NO.
v.	§	H-93-2668
	§	
BAKER HUGHES	§	
INCORPORATED,	§	
Defendant.	§	

FINAL JUDGMENT

In accordance with the court's Memorandum and Order, this action is **DISMISSED** with prejudice, and defendant's counterclaim is **DISMISSED** without prejudice. (See Docket Entry No. 14 at 14.)

This is a **FINAL JUDGMENT**.

SIGNED at Houston, Texas, on this 11th day of July, 1994.

/s/ Sim Lake
SIM LAKE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MICHAEL F. BLAKENEY, Plaintiff,	§	
v.	§	CIVIL ACTION NO. H-93-2668
BAKER HUGHES INCORPORATED, Defendant.	§	

MEMORANDUM AND ORDER

Pending before the court are Plaintiff's Motion for Partial Summary Judgment (Docket Entry No. 12) and Defendant's Motion for Summary Judgment (Docket Entry No. 14).

Plaintiff, Michael F. Blakeney, alleges that Baker Hughes Inc., his former employer, terminated his employment because of his age in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621, et seq. (ADEA). Plaintiff also alleges state law claims under Tex. Rev. Civ. Stat. Ann. art. 5221k and for intentional infliction of emotional distress. Among its defenses, defendant alleges that on April 7, 1992, plaintiff signed a "Settlement Agreement and General Release" that operates as a release and bar to the plaintiff's claims. Defendant also filed a counterclaim against plaintiff for breach of the Settlement Agreement and General Release. Plaintiff's motion for partial summary judgment argues that the release is

ineffective as a matter of law because it fails to comply with the requirements of 29 U.S.C. § 626(f)(1).[1]

1. **§ 626(f) (1) (E)**

Plaintiff argues that the release is invalid because he was not advised to consult with an attorney. The second substantive paragraph of the release signed by plaintiff states:

> The Employee represents and agrees that he fully understands his right to discuss all aspects of this Agreement with his private attorney, to the extent, if any, that he desires he has availed himself of this right, that he has carefully read and fully understands all of the provisions of this Agreement and that he is voluntarily entering into this Agreement. (Settlement Agreement and General Release, Docket Entry No. 1, Exhibit A at 4)

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[1] 29 U.S.C. § 626(f) imposes the minimum standard for a waiver of a claim under the ADEA:

(1) An individual may not waive any right or claim under this chapter unless the waiver is knowing and voluntary. . . .[A] waiver may not be considered knowing and voluntary unless at a minimum--

> (A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;
>
> . . .
>
> (C) the individual does not waive rights or claims that may arise after the date the waiver is executed;
>
> . . .
>
> (E) the individual is advised in writing to consult with an attorney prior to executing the agreement; . . .

Defendant argues that acknowledging the right to consult an attorney is equivalent to being advised to consult an attorney. 29 U.S.C. § 626(f)(1)(E) states, however, that at a minimum the individual must be "advised in writing to consult with an attorney prior to executing the agreement. . ." Although the court has not found any cases that construe this section of the statute, the ADEA "is remedial and humanitarian legislation and should be liberally interpreted to effectuate the congressional purpose of ending age discrimination in employment." *Dartt v. Shell Oil Co.*, 539 F.2d 1256, 1261 (10th Cir. 1976), *aff'd men.*, 98 S.Ct. 600 (1977). Because the release does not advise plaintiff to consult with an attorney, the court concludes that it fails to satisfy § 626(f)(1)(E), and plaintiff's Motion for Partial Summary Judgment (Docket Entry No. 12) is **GRANTED** on this issue.

2. § 626(f) (1) (C)

Plaintiff argues that the release runs afoul of § 626(f) (1) (C), which prohibits a release "that waives rights or claims that may arise after the date of the waiver." Plaintiff bases this argument on the third substantive paragraph of the release, which states that defendant is discharged from:

> all . . . claims . . . arising out of alleged violations of . . . the Federal Age Discrimination in Employment Act, which the Employee now has, owns or holds, or claims to have, owned or hold, or which Employee at any time heretofore had, owned or held, or claimed to have, own or hold, or which Employee at any time hereinafter may have, own or hold, or claim to have, own or hold against each or any of the Releases. (Release at 1)

Plaintiff's argument ignores the more specific language in the eighth substantive paragraph:

> Notwithstanding any of the above, Employee is not waiving any rights or claims that may arise after the date of the execution of this Agreement by Employee. (Release at 2)

Because the specific language of the eighth paragraph supersedes the general language of the third paragraph the release satisfies § 626(f) (1) (C), and plaintiff's Motion for Partial Summary Judgment (Docket Entry No. 12) is **GRANTED** on this issue.

3. § 626(f) (1) (A)

Plaintiff argues that the release violates 29 U.S.C. § 626(f) (1) (A) because there is ambiguity between the language of the third and eighth paragraphs as to whether the release applies to future claims. To support this argument plaintiff refers to his deposition testimony that he did not understand what he was signing. Section 62(f) (1) (A) requires that the waiver be "written in a manner calculated to be understood by such individual, or by the average individual eligible to participate." Although the court has concluded that the release satisfies § 626(F) (1) (C), the ambiguity between the third and eighth substantive paragraphs nevertheless provides support for plaintiff's argument. The ambiguity, when coupled with plaintiff's testimony, creates a fact issue that precludes summary judgment for either party on this issue.

4. Ratification

Plaintiff argues that a release that does not comply with the requirements of § 626(f) (1) is void as a matter of law and cannot be ratified. Alternatively, plaintiff argues that if the release was only voidable it was not ratified because plaintiff made a timely offer to tender the severance benefits that formed the consideration for the release back to defendant. Defendant argues that the tender was untimely and that plaintiff ratified the release by keeping the benefits for more than two years.[2]

In *Grillet v. Sears, Roebuck & Co.*, 927 F.2d 217, 221 (5th Cir. 1991), the court held that a voidable release would be ratified by the retention of benefits that formed the consideration for the release. The court explained that "[t]o avoid ratifying the release" a plaintiff must return the consideration "soon after" he learns that the release is voidable. *Id.* In *Wamsley v. Champlin Refining & Chemicals, Inc.*, 11 F.3d 534 (5th Cir. 1993), the court held that its holding and reasoning in *Grillet* applied notwithstanding the enactment of 29 U.S.C. § 626(f). The court held that a release that does not meet the requirements of 29 U.S.C. § 626(f) (1) (A)-(H) is not void of legal effect, but is simply "not knowing and voluntary and thus [is] subject to being avoided at the election of the employee." *Id.* at 539. The court also held that if the employee retains the "consideration for [his] promise not to sue," he manifests his "intention to be bound by the waivers" and thus ratifies

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[2] Although defendant did not plead ratification in its answer, the answer did recite the execution of the release and allege the defenses of release, wavier, and estoppel. Pursuant to Fed. R. Civ. P. 15(a), which provides that leave to amend shall be freely given when justice so requires, the court **GRANTS** Defendant's Motion for Leave to Amend Answer (Docket Entry No. 16).

the voidable release. *Id.* at 540. *Accord, Williams v. Phillips Petroleum Co.*, 1994 WL 247317 at 10 (5th Cir. June 24, 1994).

The Settlement Agreement and General Release signed by plaintiff recited that it was a settlement of all possible disputes with defendant that arose out of plaintiff's employment with defendant and the termination of his employment by defendant. It expressly released defendant from ADEA claims and state statutory claims. Defendant paid plaintiff over $11,000 in severance benefits as consideration for plaintiff's signing the release on April 7. 1992. (Plaintiff's deposition at 104) Plaintiff expressed no desire to return the consideration when this suit was filed in August of 1993 or when plaintiff was deposed in February of 1994. (*Id.* at 109.) Only in May of 1994 did plaintiff attempt to tender back the benefits to defendant.

Plaintiff argues that defendant is not entitled to summary judgment on its ratification defense because until his lawyer learned of the Fifth Circuit's opinion in *Wamsley* he did not know that the release was voidable. The court is not persuaded by this argument for several reasons. First, plaintiff, or at least his lawyer, was on notice since *Grillet* was decided in March of 1991 that the release was merely voidable and that continued retention of the benefits would ratify it. The *Grillet* court held that a release that was possibly deficient under the ADEA was ratified when the plaintiff retained the benefits. 927 F.2d at 220-221. Although the court did not expressly state that a release was not void as a matter of law, the court implicitly assumed this distinction in its consideration of the ratification issue.

Moreover, in *Grillet* the court held that timeliness of a tender back offer was measured from the date the plaintiff discovers that he was discriminated against. 927 F.2d at

221. Blakeney's allegation of age discrimination is based on the fact that he was laid off while younger people were retained. (Plaintiff's deposition at 17) Blakeney was aware of these facts at the time of his layoff in April of 1992, yet chose not to make a tender back of the benefits until May of 1994.[3] In *Grillet* the court held as a matter of law that retaining benefits for more than two years made it "simply too late . . . to avoid ratification." 927 F.2d at 221. Since Blakeney likewise retained the benefits for more than two years after he knew of defendant's alleged discrimination, he ratified the release.[4] Defendant's Motion for Summary Judgment (Docket Entry No. 14) is **GRANTED** on this issue; and the release bars all of plaintiff's claims.

5. Intentional Infliction of Emotional Distress

To prove intentional infliction of emotional distress under Texas law a plaintiff must show that (1) the defendant acted intentionally or recklessly, (2) the conduct was extreme and outrageous, (3) the action of the defendant proximately caused plaintiff emotional distress, and (4) the emotional distress suffered by plaintiff was severe. *Dean v. Ford Motor Credit Co.*, 885 F.2d 300, 306 (5th Cir. 1989). Extreme or outrageous conduct within the meaning of this tort is conduct that is so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly

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[3] Plaintiff filed a charge with the EEOC alleging age discrimination on November 2, 1992. (Exhibit to plaintiff's complaint)

[4] Plaintiff argues that because the tender back made in May of 1994 was rejected, any earlier tenders would have also been rejected, and thus any earlier tender would have been futile. The court is not persuaded by the argument. Even if an earlier tender back had been rejected, plaintiff's attempt to make an earlier tender would be relevant in considering whether there was unreasonable delay in making a tender.

intolerable in civilized society. An employer who does no more than exercise its right to terminate an employee has not committed outrageous conduct to the degree or character required for liability for intentional infliction of emotional distress.

The facts in this case do not show that defendant engaged in any threatening or offensive conduct. Plaintiff's deposition reflects that the only outrageous conduct alleged is that defendant laid off plaintiff. (Plaintiff's deposition at 23, 25) Additionally, plaintiff alleges only worry and weight gain as the result of his layoff. *Id.* at 25-28. Accordingly, the court concludes plaintiff has failed to raise a genuine issue of material fact as to any of the four necessary elements of his claim for intentional infliction of emotional distress. Defendant's Motion for Summary Judgment (Docket Entry No. 14) is **GRANTED** as to this claim.

Conclusion and Order

For the reasons explained above, plaintiff's Motion for Partial Summary Judgment (Docket Entry No. 12) is **GRANTED** in part and **DENIED** in part, and Defendant's Motion for Summary Judgment (Docket Entry No. 14) is **GRANTED** in part and **DENIED** in part.

SIGNED at Houston, Texas, on this 11th day of July, 1994.

/s/ Sim Lake
SIM LAKE
UNITED STATES DISTRICT JUDGE